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Reply Br. of Shaver for App.

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MAR 19 1897

JAMES H. MCLENNAN,
CLERK.

THE INTERSTATE COMMERCE
APPELLANT,

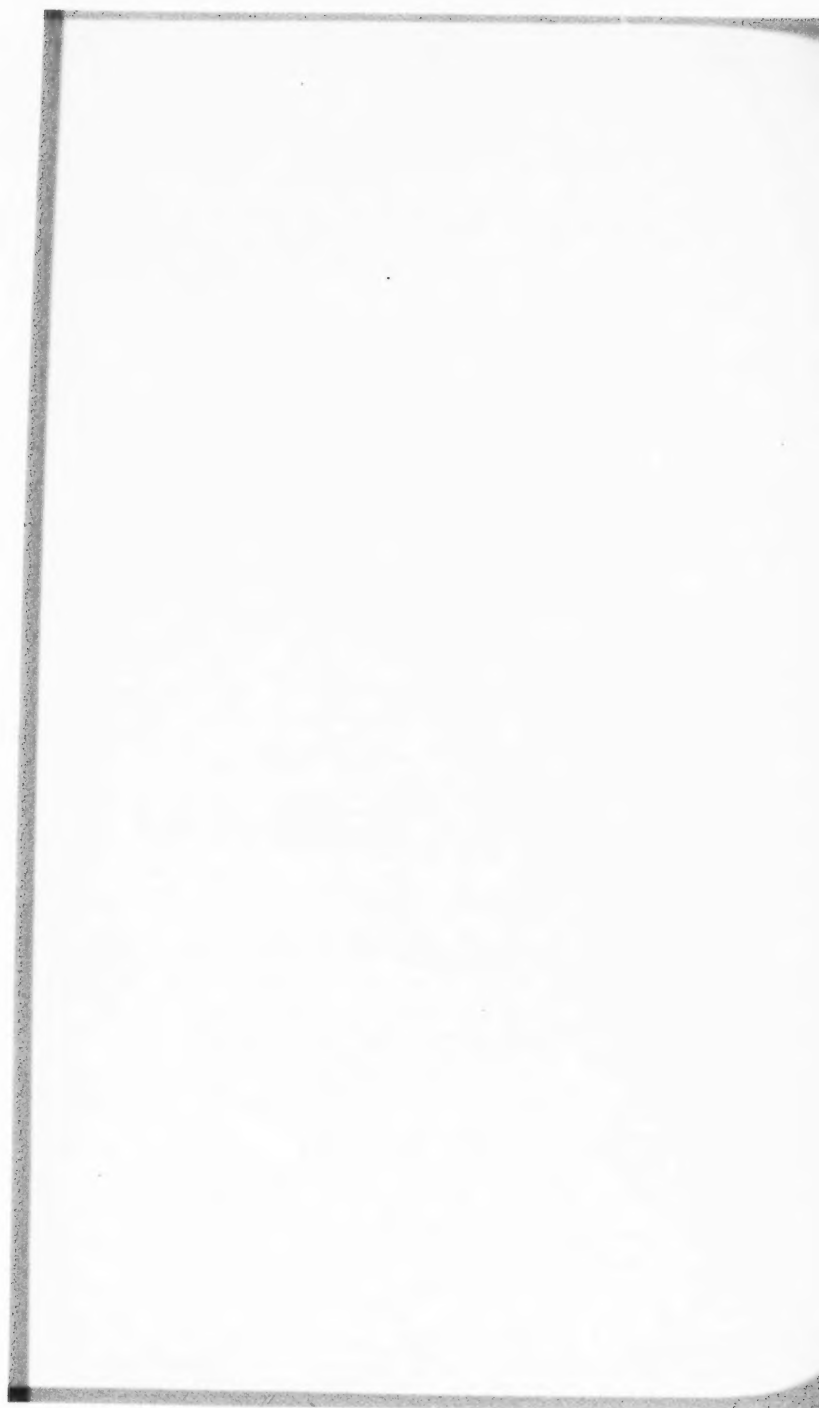
vs.

THE ALABAMA MIDLAND RAILWAY COMPANY
ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT.

Reply to Supplemental Brief of Counsel for Appellees.

L. A. SHAVER,
Of Counsel for Appellant.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1896.

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THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

THE ALABAMA MIDLAND RAILWAY COMPANY
ET AL., APPELLEES.

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I.

Counsel for the carriers filed during the concluding argument before this Court in this case a supplemental brief purporting to set forth statistics as to the earnings and

operating expenses of the Alabama Midland Railway Company for certain years.

These statistics for the years ending, June 30, 1892, and, June 30, 1894, were called for by counsel for the Commission on the examination of the witnesses for the carriers, but they failed to give them (8th cross-int., Record, p. 355). *The operations of the latter year show a surplus.*

Counsel for the Commission have had no opportunity to introduce testimony of their own or cross-examine witnesses of the roads in reference to these matters.

II.

There is a large discrepancy between the statistics for the year, 1893, given by the witness McLendon in his testimony (answer to 10th direct interrogatory, Record, p. 352) and the statistics set forth in the supplemental brief of the carriers, as shown below:

TESTIMONY OF MCLENDON.

<i>Gross or total earnings.</i>	<i>Total operating expenses.</i>	<i>Deficit.</i>
\$490,767.77	\$568,362.32	\$87,594.55

STATISTICS IN SUPPLEMENTAL BRIEF.

<i>Gross or total earnings.</i>	<i>Total operating expenses.</i>	<i>Deficit.</i>
\$490,768.00	\$542,861.00	\$52,093.00

Discrepancy, \$25,471.57.

If we may apply the maxim, *ex uno disce omnes*, the testimony of this witness on other matters may be presumed to be equally variant from the facts.

III.

The witnesses for the carriers, Lee McLendon, passenger and freight agent, and W. J. Haylow, master of transportation, of the Alabama Midland, both testify that the year 1893 was an "*exceptionally bad year as regards the Alabama Midland*," and that during the years, 1892 and 1893, the "*revenue of railroads throughout the country had fallen off materially because of the depressed financial condition of the country*," as follows:

"Answering the 9th cross: The revenues of railroads *generally throughout the country* have fallen off materially, according to my information and observation, during the last two or three years *on account of the depressed business and financial condition of the country*. I am not able to state whether the revenues of the Alabama Midland railway for the fiscal year 1892-'93 were reduced by cut rates or rate wars. *The fiscal year 1892-'93 was an exceptionally bad year.*" (Record, p. 271.)

"Answering the 9th cross: The revenue of railroads *generally throughout the country* has fallen off materially during the last two or three years *because of the depressed financial condition of the country*. I am unable to state whether the revenue of the Alabama Midland Railway Company for the fiscal year July, '92, to June, '93, was decreased by cut rates

and rate wars. The fiscal year July, '92, to June, '93, was an exceptionally bad year as regards the Alabama Midland Railway Co." (Record, p. 355.)

The deficits for the years 1892 and 1893 are attributed by these witnesses, *not to rates unremunerative in themselves*, but to want of business resulting from the "*depressed financial condition of the country*," which affected railroads generally.

IV.

Business losses, occasioned by the "depressed financial condition of the country," do not justify a carrier in charging the public (or any portion of the public) rates higher than are reasonable "*in view of the nature and value of the service rendered by the company*." (Covington and Lexington Turnpike Co. *vs.* Sanford *et al.*, decided by this Court, December 14, 1896.)

Such business losses cannot justify discrimination against Troy.

V.

The question is, Will the rates to Troy prescribed by the Commission be reasonably remunerative to the carriers "*in view of the nature and value of the service rendered?*"

(a.) Rates from the East:

On shipments from northeastern cities to Troy and Montgomery, where Troy is the shorter, and Montgomery the longer, distance point, the order of the Commission requires that the rates to Troy shall not be in excess of those to Montgomery.

The same rate to Troy as to Montgomery, where Troy is the shorter-distance point, will yield the carriers a higher rate per ton per mile to Troy than to Montgomery.

If the rate to Montgomery is reasonably remunerative to the carrier (which must be presumed in the absence of proof to the contrary), then the same rate to Troy for a shorter haul will be still more remunerative.

(b.) Rates from Cincinnati, Louisville, and St. Louis:

That the rates prescribed by the Commission from Cincinnati, Louisville, and St. Louis to Troy will be reasonably remunerative to the carriers appears from the facts stated by the Commission in its report. (Record, pp. 64, 65. See also pages 83, 84 of my original printed argument.)

VI.

The statistics in the supplemental brief show a surplus for the year 1891 and for the last two years named, 1894 and 1895; also, that in the whole six years named there was a

net surplus—this, notwithstanding depressed *business* conditions.

VII.

According to the estimate of McLendon, the receipts of the Alabama Midland for the year 1893 on through traffic from the East to Troy and *other stations* on that road east of Montgomery would have been \$7,448 less than they were if Troy and *such other stations* had been given rates relatively equal to the Montgomery rates. (Answers to 15th and 16th direct interrogatories, Record, p. 352.)

The possible loss of this sum on shipments to *all* stations east of Montgomery does not warrant the denial to Troy of rates not in excess of the Montgomery rates, the haul to Troy over the Midland road being *52 miles less than* to Montgomery.

VIII.

McLendon was asked on cross-examination if, in making the above estimate of loss, he had taken into consideration the fact, among others, that traffic to Troy and the other stations east of Montgomery on the Alabama Midland would probably be increased by relatively equal rates, and replied in substance that he had not.

7th cross-interrogatory, Record, p. 213.

Answer to 7th cross-interrogatory, Record, p. 324.

The stimulus given to business at Troy and other stations on the Alabama Midland road east of Montgomery by relatively equal and just rates would increase traffic to those stations largely and *correspondingly augment the revenue of the road*. "*That proposition has been so often practically demonstrated that no intelligent observer can reject it.*" (Aldace F. Walker—see original printed argument, pp. 57, 58.)

The prosperity of a road must be more dependent upon the general prosperity of communities and stations along its entire line than upon that of a few widely separated trade centers or distributing points. (See original printed argument, pp. 59-61.)

If the rates to Troy and other points on the Alabama Midland road are made relatively equal to the Montgomery rates, the traffic to Troy and those other points will be so much increased and the receipts therefrom of the road so much augmented, that instead of a loss there will be a gain in revenue.

IX.

In a brief filed March 8, 1897, a few days prior to the argument before this Court, by A. A. Wiley, Esq., counsel for the Alabama Midland and Savannah, Florida and Western Railway Companies, the bulk of the *alleged* facts stated are *outside the record*.

For example, under the title "Lower rates," on page 23, the rates set forth were not proven and are in no way referred to in the record or in any official publication known to us. They appear, moreover, to be irrelevant to any issue in this case.

The Court will notice that in only three instances in the entire brief are the pages of the record cited on which the *alleged facts* can be found.

On page 7 it is stated :

"Goods are *sometimes* sent through in the original cars and at other times transferred *en route* on through shipments from Louisville, Cincinnati, and St. Louis via Montgomery to Troy."

The inference from this might be that the through shipments to Troy were the exception, whereas the unanimous testimony of the witnesses for the carriers as well as for the Commission is that *through shipments to Troy without transfer are the rule*. Below are a few extracts from the testimony on this point.

B. M. Talbot, a wholesale grocery merchant at Troy, testifies :

"When class goods are shipped from Louisville, Cincinnati, St. Louis, and other Ohio River points via Montgomery to Troy, *they are shipped on a through bill of lading to Troy at an aggregate through rate*. Freight from Ohio River points to Troy *all come in car-loads, and it would not be necessary to transfer from car to car at Montgomery; it comes to Troy in the original car in which it is loaded at the initial point*." (Answer to third interrogatory, Record, pp. 223, 224.)

Charles Henderson, also a wholesale grocery merchant at Troy, testifies:

"When class goods are shipped from Louisville, Cincinnati, and St. Louis via Montgomery to Troy, *they are shipped under a through bill of lading and for an aggregate through rate.* There is no transfer of such freight at Montgomery from the cars in which it is brought to that city to the cars on the road of the Georgia Central or Alabama Midland Companies, but the car containing such freight is transferred from one road to the other, unless the through car is disabled, and then the transfer is made from the disabled car at the station at which the disabling occurs." (Third direct interrogatory, Record, p. 228.)

J. B. Corcoran, agent for the Alabama Midland railway at Troy, testifies:

"When class goods are shipped from Louisville, etc., to Troy via Montgomery, they are shipped under a through bill of lading at an aggregate through rate." (Third direct, Record, p. 233.) "I have never had any class goods shipped from Louisville, Cincinnati, and St. Louis, or other Ohio River points via Montgomery to Troy for my individual account, but in the line of my duties as agent have handled the bills of lading on such shipments, and have observed that the through rate on such shipments was specified in the bill." (First cross, Record, p. 233.)

Theodore Welch, general freight agent of the Louisville and Nashville road, testifies:

"On through shipments from Louisville, etc., to Troy via Montgomery, in case of car-loads, as corn, flour, meat, etc., the freight would go through to Troy in the same cars in

which it is brought to Montgomery. At least this is the general rule."

The evidence of a number of other witnesses is to the same effect, and there is none to the contrary. (Original printed argument, pp. 42-45, 48-51.)

On page 6 of Mr. Wiley's brief it is stated that—

"The proof shows that the rates complained of are approved by the railroad commissions of Alabama and Georgia."

The "rates complained of" are through rates on *interstate* commerce. State railroad commissions have no jurisdiction of through rates on interstate commerce or of any proportion of such through rates, and the proof shows that the Alabama railroad commission has only approved the rates between Montgomery and Troy as *local* rates on strictly local hauls, originating at Montgomery and terminating at Troy (answer to 6th cross-interrogatory, Record, pp. 274, 281). The reasonableness of those rates as local rates is not in issue, but only their reasonableness as proportions of through rates on interstate traffic to or from Troy. (See my original printed argument, pp. 41-43.)

Respectfully submitted.

L. A. SHAVER,
Of Counsel for Appellant.